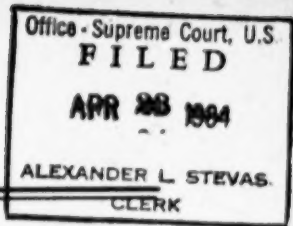


No. 83-592



In the Supreme Court of the United States

OCTOBER TERM, 1983

LORI L. OSTROSKY, ET AL., APPELLANTS

v.

STATE OF ALASKA

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

DONALD A. CARR

LESLIE M. KANNAN

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

QUESTION PRESENTED

Whether Alaska's Limited Entry Act, Alaska Stat. §§ 16.43.010 *et seq.* (1983), which limits access to commercial salmon fishing to holders of heritable and transferable permits, violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

<i>Brown v. Board of Education</i> , 347 U.S. 483	10
<i>Califano v. Jobst</i> , 434 U.S. 47	12
<i>Califano v. Webster</i> , 430 U.S. 313	10
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297	10
<i>Commercial Fisheries Entry Commission v.</i> <i>Apokedak</i> , 606 P.2d 1255	2, 9
<i>Craig v. Boren</i> , 429 U.S. 190	10
<i>Dandridge v. Williams</i> , 397 U.S. 471	9
<i>Douglas v. Seacoast Products, Inc.</i> , 431 U.S. 265	10
<i>Isakson v. Rickey</i> , 550 P.2d 359	3
<i>Jimenez v. Weinberger</i> , 417 U.S. 628	11
<i>Kotch v. Board of River Port Pilots</i> <i>Commissioners</i> , 330 U.S. 552	10, 11
<i>San Antonio Independent School District v.</i> <i>Rodriguez</i> , 411 U.S. 1	10
<i>Schweiker v. Wilson</i> , 450 U.S. 221	12

IV

Page

Cases—Continued:

<i>Takahashi v. Fish & Game Comm'n</i> , 334 U.S. 410	10
<i>Toomer v. Witsell</i> , 334 U.S. 385	10
<i>Williamson v. Lee Optical, Inc.</i> , 348 U.S. 483	10
<i>Zobel v. Williams</i> , 457 U.S. 55	10

Constitutions, statutes and regulations:

U.S. Const.:

Art. I, § 8 (Commerce Clause)	5
Amend. V (Due Process Clause)	9
Amend. XIV (Equal Protection Clause)	5, 9, 12

Alaska Const.:

Art. I, § 1	5
Art. VIII, § 3	5

Magnuson Fishery Conservation and Management

Act, 16 U.S.C. 1801 <i>et seq.</i>	6
16 U.S.C. 1801(b)	6
16 U.S.C. 1852(h)(1)	7
16 U.S.C. 1853(b)(6)	7

Limited Entry Act, Alaska Stat. §§ 16.43.010

<i>et seq.</i> (1983)	2, 3, 6, 7
§ 16.43.010(a)	2
§ 16.43.010(b)	2
§ 16.43.020	2
§ 16.43.140	2
§ 16.43.150(c)	3

Constitutions, statutes and regulations—Continued:

§ 16.43.150(h)	3
§ 16.43.160	3
§ 16.43.170(b)	3, 4
§ 16.43.250(a)(1)	2
§ 16.43.290	3
§§ 16.43.300-16.43.330	3
§ 16.43.360 (1977)	1
§ 16.05.330	2
§ 16.05.930	2
§ 16.10.320	11
50 C.F.R.:	
Pt. 602, Subpt. B App. A	7
Section 602.14	7
Pt. 652:	
Section 652.4(b)(i)	8
Section 652.4(b)(ii)	8
Section 652.4(b)(iii)	8
Section 652.4(h)(2)	8
Pt. 674:	
Sections 674.1 <i>et seq.</i>	8
Section 674.4(a)	7
Section 674.4(b)	7
Alaska Admin. Code tit. 20 (July 1983):	
§ 05.300	2
§ 05.310	2
§§ 05.600 <i>et seq.</i>	2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-592

LORI L. OSTROSKY, ET AL., APPELLANTS

v.

STATE OF ALASKA

*ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF ALASKA*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Appellants were convicted in the Superior Court of the State of Alaska, Third Judicial District, on one count of commercial fishing for salmon in Bristol Bay without a permit and one count of illegal possession of commercially caught fish, both in violation of Alaska's Limited Entry Act, Alaska Stat. § 16.43.360 (1977). Harold Ostrosky was fined \$10,000 with \$9,000 of that amount suspended; the other two appellants, his daughters, were each fined \$5,000 with \$4,500 suspended. Appellants' boat was ordered forfeited to the State, but forfeiture was suspended for two years. J.S. App. 3a. After sentence, the superior court granted appellants' motion to vacate their convictions (J.S. App. 4a n.3). The Alaska Court of Appeals certified the case to the Alaska Supreme Court, which reversed (J.S. App. 1a-26a).

1. The Alaska Legislature adopted the Limited Entry Act (the Act), Alaska Stat. §§ 16.43.010 *et seq.* (1983), in 1973, because it concluded that both the economic efficiency of the fisheries as well as sustained yield fishery management were seriously threatened by the levels of participation in commercial fishing in certain State-controlled fisheries. Alaska Stat. § 16.43.010(b) (1983). The express purposes of the statute therefore were conservation of the State's fishery resources and promotion of "the economic health and stability of commercial fishing" by "controlling entry into the commercial fisheries in the public interest and without unjust discrimination." Alaska Stat. § 16.43.010(a) (1983); see also *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255 (Alaska 1980).

In order to limit the number of commercial fishermen in threatened fisheries, the Act established a Commercial Fisheries Entry Commission which was empowered to issue a finite number of permits authorizing commercial exploitation of these fisheries. Alaska Stat. §§ 16.43.020, 16.43.140 (1983). The Commission has imposed a limit only on access to fisheries of salmon and herring within the State. All other fishing in Alaska is open to all commercial fishermen. Alaska Admin. Code tit. 20, §§ 05.300, 05.310 (July 1983). In addition, the access limitations apply only to commercial fishing; recreational and subsistence fishing are still available by permit to all fishermen. Alaska Stat. §§ 16.05.330, 16.05.930 (1983). Finally, only one person on a fishing vessel needs to have a permit. Any individual can be a commercial fisherman so long as someone who has a permit is on the boat with him.

The initial selection of permittees was based on several criteria, but of primary importance was the degree to which an applicant was dependent upon commercial fishing in the threatened fishery for a livelihood. Alaska Stat. § 16.43.250(a)(1) (1983); Alaska Admin. Code tit. 20, §§ 05.600 *et seq.* (July 1983). Generally, this meant that

part-time fishermen were to be excluded from the commercial fisheries in order to enhance the economic opportunities of those for whom a given fishery was the primary source of income.

The entry permit received by the applicant is valid for one year, but is renewable annually upon the payment of a fee. Alaska Stat. § 16.43.150(c) (1983). The fee charged for permits ranges from less than \$10 to \$750, depending on the expected rate of economic return for the particular fishery. Alaska Stat. § 16.43.160 (1983). The Commission is also authorized to modify the number of outstanding permits; it may issue new permits or buy back existing ones in order to maintain "the optimum number of entry permits for each fishery." Alaska Stat. § 16.43.290 (1983); *id.* §§ 16.43.300-16.43.330. The "optimum number" of permits is to be decided on the basis of a "reasonable balance" of three factors—providing fishermen with a reasonable rate of return on their investment, assuring that the fish harvest is conducted in an orderly and efficient manner and protecting fishermen from serious economic hardship. Alaska Stat. § 16.43.290 (1983). Since the issuance of the initial permits, the Commercial Fisheries Entry Commission has not, however, found any change in circumstances that has required it to act upon new applications from fishermen seeking to enter any of the fisheries that have been included in the limited entry program.¹

The Limited Entry Act provides that the permits are transferable by sale, gift, devise or intestate succession. Alaska Stat. §§ 16.43.170(b), 16.43.150(h) (1983). Reportedly, large numbers of permits have been transferred

¹Some fishermen's applications were accepted after the Alaska Supreme Court struck down on equal protection grounds an eligibility provision that required applicants to have fished commercially during 1973 in order to obtain a permit. *Isakson v. Rickey*, 550 P.2d 359 (Alaska 1976).

pursuant to these provisions at a fluctuating market price reflecting the relative abundance of commercially exploitable fish in the various regions (J.S. App. 14a & n.8). Thus, although the Commercial Fisheries Entry Commission is authorized to regulate the renewal and transfer of permits,² possession of a valid permit at least for the foreseeable future carries with it many incidents of private ownership of personal property.

2. In 1979, appellants were convicted of fishing commercially for and unlawfully possessing salmon in the Bristol Bay of Alaska, which is the richest salmon fishing area in the State (J.S. App. 3a). Bristol Bay is a limited access fishery and therefore commercial fishing is permissible only by those who hold a valid permit. Although appellant Harold Ostrosky was apparently eligible for such a permit when they were initially issued, he did not apply for one (Mot. to Dis. or Aff. App. A). Since no new permits have been or are being issued, appellants are precluded from commercial fishing for salmon from their own boat in Bristol Bay unless they purchase or inherit a permit or receive one as a gift. Appellants thus challenged their convictions in post-trial motions as violative of several provisions of both the state and federal constitutions.

The superior court granted the motion. Relying solely upon the Alaska Constitution, the court held that the market allocation system for previously issued permits did "not bear a fair and substantial relation to the statutory purposes of protecting the fishermen's investment and preventing fishermen from economic distress" (J.S. App. 7a n.3). The court also held "that the inheritance and transferability provisions of the Act have the effect of causing,

²Transferees must establish their ability to participate in the fishery before the Commission can approve the transfer and reissue the permit to the transferee. Alaska Stat. § 16.43.170(b) (1983).

rather than avoiding, unjust discrimination, among those seeking permits" in violation of the State's equal protection clause (*ibid.*). Since the permit system was invalid, the court concluded that it would be unfair to penalize appellants criminally for failing to possess a permit (*ibid.*).

The Alaska Supreme Court reversed (J.S. App. 1a-26a). First, it rejected appellants' challenge to the validity of the initial entry restrictions. The court found that the restriction was consistent with the State's constitutional provision that reserves to the people of the State access to fish and wildlife, Alaska Const. Art. VIII, § 3, and the provision that guarantees all individuals equal protection under the law, Alaska Const. Art. I, § 1 (J.S. App. 6a-11a).³

Second, the court held that the transferability provision of the limited entry program did not violate either the State or the United States Constitution. With regard to the equal protection claim, the court noted that the standard is somewhat different in the two constitutions. Nevertheless, applying both provisions, the court found that appellants' asserted interest in engaging in commercial fishing is "not of a high order" and, therefore, that the State statute need only satisfy a rational basis test in order to withstand scrutiny under either equal protection provision (J.S. App. 17a, 19a).

The court found that unrestricted transferability of permits was intended to serve four basic objectives, viz., "(1) enhancing the economic benefit to fishermen; (2) conserving the fishery; (3) avoiding unjust discrimination in the allocation of a limited number of entry permits; and (4)

³The Alaska Supreme Court also rejected appellants' claim that the entry restrictions violated the Commerce Clause of the United States Constitution (J.S. App. 12a n.6). There is no indication that appellants challenged the entry restrictions as being in violation of the Equal Protection Clause of the Fourteenth Amendment.

administrative convenience" (J.S. App. 20a). The court then concluded that these objectives are "legitimate" and "they are fairly and substantially furthered by free transferability" (*id.* at 21a). The court thus held that "the state constitution is not violated [and] * * * [t]he same analysis is applicable, and yields the same conclusion as to federal equal protection" (*ibid.*).⁴

DISCUSSION

The challenge mounted against Alaska's Limited Entry Act implicates similar allocation systems adopted for fisheries within the federal government's jurisdiction under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* Congress enacted that statute for reasons similar to those that motivated the State Legislature to adopt its statute, and, in our view, there is no constitutional obstacle to implementing the federal law through programs that include the same features as the Alaska scheme in suit. Accordingly, we believe the Alaska Supreme Court was clearly correct in rejecting appellants' attack and urge affirmance of that decision or dismissal of the appeal for want of a substantial federal question.

1. In 1976, Congress adopted the Magnuson Fishery Conservation and Management Act, which like Alaska's Limited Entry Act is designed to conserve fishery resources, provide an optimum yield of fish in all fisheries within the United States' jurisdiction and to promote domestic commercial fishing. 16 U.S.C. 1801(b). To fulfill these purposes nationwide, Congress created eight Regional Fishing Management Councils (Regional Councils), which are required to prepare and submit to the Secretary of Commerce "a fishery management plan with respect to each fishery within

⁴Justice Rabinowitz dissented, but only on the basis that the transferability provisions violated the State constitution (J.S. App. 21a-26a).

its geographical area of authority." 16 U.S.C. 1852(h)(1). Congress delegated to the Regional Councils and the Secretary the authority to "establish a system for limiting access to the fishery in order to achieve optimum yield," so long as the Regional Council or Secretary takes into account, inter alia, existing participation in a fishery, traditional fishing practices at the fishery and the capability of present users to use other fisheries. 16 U.S.C. 1853(b)(6).

The regulations implementing the National Guidelines for Fishery Management Plans recognize that there are a variety of systems available to allocate access to fisheries, and the choice of any particular system must depend upon circumstances unique to a particular area and fishery. 50 C.F.R. 602.14. As the appendix to the regulations explains (50 C.F.R. Pt. 602, Subpt. B App. A at 431):

*Direct allocations * * ** have been made by the several Councils in a variety of [Fishery Management Plans] in the past: Quotas by classes of vessels (Atlantic groundfish), quotas for commercial and recreational fishermen (Atlantic mackerel), different fishing seasons for recreational and commercial fishermen (salmon), assignment of ocean areas to different gears (stone crab), and limiting permits to present users (surf clam).

Although the Regional Councils, like the State of Alaska, ordinarily prefer not to impose fixed restrictions on commercial fishermen's access to a particular fishery, they have done so when they have found it necessary to conserve a particular fishery. Thus, for instance, the North Pacific Fishery Management Council has limited commercial salmon fishing in the fishery conservation zone located to the east of Cape Suckling to operators who on May 15, 1979, held a valid State of Alaska permit issued pursuant to the State's Limited Entry Act or who had actually operated a fishing vessel in the management area and landed salmon during the calendar years 1975, 1976 or 1977. 50 C.F.R.

674.4(a) and (b). The validity of this plan is thus dependent on the constitutionality of Alaska's scheme.⁵

Similarly, the Mid-Atlantic Regional Council adopted a limited entry plan for its surf clam fisheries in the Mid-Atlantic Region. A permit to fish is required and a vessel is eligible for a permit only if it was actually used for fishing, was being constructed or was replaced by a vessel that was actually used for fishing in November 1977. 50 C.F.R. 652.4(b)(i), (ii) and (iii). No new vessels are eligible. Although the permit expires when the vessel changes ownership, the new owner will receive a new permit for the vessel if he requests one. 50 C.F.R. 652.4(h)(2). The permits therefore are in effect transferable and inheritable; they run with the vessel which is itself freely transferable. Thus, the Mid-Atlantic Regional Council's plan has substantial elements in common with Alaska's limited entry system.

2. To our knowledge no one has challenged, on equal protection grounds, any of the Regional Councils allocation systems, including the North Pacific's salmon plan or the Mid-Atlantic Regional Council's surf clam program; nor would such a challenge be successful. The resource allocation decisions that the federal government, and the State of Alaska, must make with regard to those fisheries

⁵Alaska's conservation plan for Bristol Bay also affects another portion of the High Seas Salmon Fishing Management Plan, which was adopted pursuant to the Magnuson Fishery Conservation and Management Act, (see 50 C.F.R. 674.1 *et seq.*). The Salmon Plan prohibits all commercial salmon fishing in federal waters west of Cape Suckling — *i.e.*, it prohibits commercial net or troll fishing outside Alaska's three-mile territorial sea in Bristol Bay where appellants were arrested. The reason the management plan prohibits commercial salmon fishing is that Alaska allows the use of nets within state waters by fishermen holding Limited Entry Permits. The North Pacific Fishery Management Council concluded that all salmon available in commercial quantity would be taken within three miles of Alaska, and that therefore none would be available in the federal Fishery Conservation Zone.

that are endangered by overuse are the type of decisions that must be subject to the least intrusive standard of judicial review under the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment.

It is not clear precisely what appellants challenge. At one point in their Jurisdictional Statement they seem to attack the very idea of limited entry with regard to a "public" resource such as fish (J.S. 8); at times, they appear to challenge the original criteria for selecting permittees (J.S. 9-11); but the thrust of their challenge is clearly aimed at the free market allocation system Alaska has adopted (J.S. 7-13). The first two contentions directly implicate many of the Regional Council plans, which for reasons stated below we believe are plainly constitutional. Initially, we note, however, that these broader challenges seem not to have been presented to the Alaska Supreme Court and therefore are not properly before this Court.⁶

In any event, since all three challenges are based on the Equal Protection Clause of the Fourteenth Amendment, the basic inquiry is the same. It is well settled that this Court employs a tiered approach to analyzing equal protection challenges to statutes. At one extreme, if the statute discriminates against a suspect class of individuals or interferes with the exercise of a fundamental right, the Court presumes the statute is unconstitutional and applies a "strict scrutiny" standard of review, which requires the State to

⁶It is at least questionable whether appellant Harold Ostrosky has standing to challenge the legality of the initial criteria since he arguably would have received a permit under those standards if he had applied for one.

We note that the constitutionality of the selection criteria was raised in a previous state court proceeding by different litigants, and the Alaska Supreme Court found the initial criteria to be constitutional. *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255 (Alaska 1980). To our knowledge, no one has since challenged them.

show that its classification is necessary to fulfill a compelling governmental interest. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954). At the other extreme, if an economic regulation is challenged, the inquiry is based on a rational relationship test: whether the statutory classification rationally furthers a legitimate state objective. See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970). In the middle tier cases, such as those involving gender-based classifications, the State is required to show that the classification is substantially related to the achievement of important governmental objectives. See, e.g., *Califano v. Webster*, 430 U.S. 313 (1977); *Craig v. Boren*, 429 U.S. 190 (1976).

The Alaska Supreme Court correctly concluded that appellants' interest in being able to engage in commercial fishing is not a fundamental right or an interest that triggers judicial scrutiny more intrusive than the "rational relationship" test ordinarily applied to any classifications based on the government's regulation of economic interests. See, e.g., *Zobel v. Williams*, 457 U.S. 55, 61 (1982); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Indeed, appellants concede (J.S. 8-9) that the State has the "power to preserve and regulate the exploitation of an important resource," such as fish. *Toomer v. Witsell*, 334 U.S. 385, 402 (1948) (footnote omitted). See *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420-421 (1948). The State's interest in regulating fishermen is certainly no less than it has in licensing hot dog vendors, *City of New Orleans v. Dukes*, *supra*, river boat pilots, *Korich v. Board of River Port Pilots Commissioners*, 330 U.S. 552 (1947), or opticians, *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487-488 (1955). And, on the other hand, appellants' interest in commercial fishing is no more fundamental than the interests asserted in those cases. There is therefore no reason not

to judge the present commercial activity by the same lenient standard.

Nor is a different result required because entry is limited by a permit that can be transferred or devised. In *Kotch v. Board of River Port Pilots Commissioners*, 330 U.S. at 555 (citation omitted), the Court noted that the limited entry system there was " 'closed . . . to all except those having the favor of the pilots,' " yet the Court still analyzed the State's scheme under a rational relationship approach. If anything, Alaska's scheme is significantly more open than was Louisiana's at issue in *Kotch*. In *Kotch*, access to a river boat pilot's license was restricted to family and close friends of pilots who held a license. By contrast, there is a brisk market for permits under Alaska's system and therefore entry is available for fishermen such as appellants, albeit at a price. The State, however, has significantly eased the financial burden on entrants by providing loans at reasonable interest rates to those who are capable of engaging in commercial fishing for salmon. Alaska Stat. § 16.10.320 (1983). Accordingly, the State's permit scheme involves no more than the regulation of a simple economic activity, and should be upheld if the scheme rationally furthers a legitimate State interest.⁷

⁷Appellants' argue that Alaska's limited entry system, by providing protection for a permit holder's family discriminates "as to status by birth" (J.S. 13), because individuals born to a parent who has no permit will lack access to commercial salmon fishing. But cases cited by appellants (J.S. 12-13) involving disabilities imposed by governments on the basis of illegitimacy, such as *Jimenez v. Weinberger*, 417 U.S. 628 (1974), are not comparable to this case. The child born to a parent who does not hold a permit is not forever barred from acquiring a permit. Indeed, the child is not barred from being a salmon fisherman; he only needs to find employment on a boat operated by a permittee. Moreover, a child of a permit holder is not guaranteed that he will be able to fish for salmon commercially; the permittee is free to sell or give the permit away or devise it to someone other than a relative. Thus, the statute in no way creates a family based set of distinctions that might require a

Appellants do not even argue that the State's statutory interests are not legitimate or furthered by the permit system it has created. There is no question that the need to conserve the State's fisheries is a legitimate interest of the State. Thus, at least some limited access scheme is plainly warranted. The choice of a free market system eliminates the tremendous burden and expense that an administratively operated permit system would impose upon the State. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 238-239 (1981). Moreover, the State has legitimately adopted a limited access scheme designed to protect the welfare of those who are and have been dependent on salmon fishing for their livelihood. The market value of the permit under the State-created free market system assures that both fishermen and their families will be taken care of in case of death or disability. This security will also assure that the fishing industry, which is of vital importance to the State's economy, remains strong. These justifications are more than sufficient. There is no doubt that the State's scheme satisfies the rational relationship test.

3. In our view, the question of the constitutionality of Alaska's permit system does not warrant plenary consideration by this Court. The decision below does not conflict with any decision of any other court, and, although not unique, Alaska's particular permit system is not a prevalent model.⁸ But, more important, we believe the judgment of

stricter level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Compare *Califano v. Jobst*, 434 U.S. 47 (1977).

⁸The scheme is not even prevalent in Alaska. Nor is it likely that the Regional Councils outside of the North Pacific Region would adopt a plan exactly like Alaska's. All of the existing plans from other regions involve issuing the permit to a vessel and it seems likely that that practice will continue.

the Alaska Supreme Court is so plainly correct in rejecting the federal constitutional claim as to justify summary disposition of this appeal.

CONCLUSION

This judgment should be affirmed or the appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

REX E. LEE

Solicitor General

F. HENRY HABICHT, II

Assistant Attorney General

DONALD A. CARR

LESLIE M. KANNAN

Attorneys

APRIL 1984